PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Dill, 2011 NSPC 96

Date: 20111212
Docket: 2115406, 2115407,2115408, 2114962, 2114963, 2114964, 2114965, 2114966, 2168870, 2115405, 2177661, 2177662
Registry: Truro

Between:

Her Majesty the Queen

v.

Ryan Gregory Dill

Editorial Notice
Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 486.4 of the *Criminal Code*, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way

Judge: The Honourable Judge Del W. Atwood

Heard: 11, 15, 16, 18 August, 2011, 28 October 2011

Written decision: 12 December 2011

Charges: 86(1), 139(1), 145(3), 145(5.1), 151, 152, 264.1(1)(a), 271, 423(1)(b) of the *Criminal Code of Canada*

Counsel: Richard Hartlen, for the Nova Scotia Public Prosecution Service
Alain Bégin , for Ryan Gregory Dill

By the Court:

Preamble

[1] A verdict rendered by a court after hearing evidence in a criminal trial cannot change things that happened. Furthermore, forensic decision making cannot be equated with that branch of human knowledge we call “history”, and this is for a wide array of reasons. First of all, history often concerns itself with monumental events, occurrences that are the subject of extensive and contemporaneous record keeping; contrast this to a case heard in a court of criminal jurisdiction, when the principal record is often unwritten, individual human memory. Those whose profession is the compilation of history have the benefit of time and resources to research events, analyze and report on them. Trials, on the other hand, are necessarily economical, and focussed typically–at least on the prosecution side– on evidence gleaned from police investigations, which are similarly economical and time-limited. History can be rewritten, should new records or testimonies be discovered; in the criminal-justice system, the constitutional protection against double jeopardy means that an accused can be tried once, and once only, for a specific charge, and, subject to the limited scope of appellate review, verdicts are final. History can result in a multitude of judgments,

sometimes vastly conflicting; a criminal court may render but a single verdict on a charge, necessarily binary: guilty or not guilty. Lastly, historians are far less constrained in their reception of information than courts, which must filter evidence based on strict standards of constitutional and legal admissibility. Accordingly, whereas history is concerned with what happened, a trial is concerned with what has been proven. The two are not always the same.

Summary of charges

[2] Ryan Dill is charged with a number of offences, which I would summarize in the following table:

Case #	Date of Allegation	Charge	Location
2115406	1/09/07-14/09/09	sexual assault	Londonderry and Tatamagouche
2115407	1/09/07-14/09/09	sexual touching	idem
2115408	1/09/07-14/09/09	invitation	idem
2114962	11/11/09	sexual touching	Tatamagouche
2114963	11/11/09	obstruct justice	Tatamagouche
2114964	11/11/09	breach 11.1 bail	Tatamagouche
2114965	11/11/09	intimidation	Tatamagouche
2114966	11/11/09	death threats	Tatamagouche
2168870	11/11/09	sexual assault	Tatamagouche
2115405	14/11/09	careless storage	Truro

2177661	14/04/10	undertaking breach	Truro
2177662	16/04/10	idem	Truro

A charge under sub-s. 145(5.1), case number 2115232, was dismissed on motion of the prosecution.

History of proceedings

[3] The prosecution elected to proceed by indictment on all of the charges. Following a preliminary inquiry that was heard by my colleague, MacKinnon J.P.C., Mr. Dill re-elected with the consent of the Crown, pursuant to para. 561(1)(a), to having these charges tried in Provincial Court. All of the charges were joined by consent, and evidence was heard by the Court on 11, 15, 16 and 18 August, 2011, and on 28 October 2011. Counsel summed up on 4 November 2011, and I reserved my decision until today. Based on the agreement of counsel as put on the record on the first day of trial, the Court will render a decision on all matters except the careless-storage charge, case number 2115405; the Court understands that there will be a change of plea on that matter once the verdicts on all the other charges have been rendered.

Theory of the prosecution

[4] It is alleged that Mr. Dill engaged in intimate and protracted sexual activity with a female, K.L.J. This amounts to an allegation of criminal conduct, as K.L.J. was born on [*identifying biographical data redacted*], legally incapable of giving her consent. Additionally, Mr. Dill is alleged to have made threats to K.L.J. and intimidated her after she made a complaint to police, apparently in an effort to have K.L.J. recant her statements. Finally, Mr. Dill is alleged to have had ongoing contact with K.L.J., including sexually intimate contact, after having been admitted to bail, the terms of which included no-contact restrictions.

Theory of the defence

[5] It is clear from the manner in which the evidence unfolded, and from the closing arguments of counsel, that there are no special or general defences being asserted by Mr. Dill; it is not argued by Mr. Bégin that Mr. Dill has an honest but mistaken belief that K.L.J. was of the age of consent, nor that any physical contact Mr. Dill might have had with K.L.J. was accidental, without requisite *mens rea*. No. The position taken by Mr. Dill's counsel is simply that the Crown has not proven beyond a reasonable doubt that the acts described by K.L.J.–comprised of

the sexual activity, the threats, the intimidation, and the prohibited post-bail contact–ever took place. For the reasons that follow, I believe that Mr. Bégin is correct, and it is the conclusion of the Court that Mr. Dill be acquitted of all charges, with the exception, of course, of the unsafe-storage count.

Analysis

[6] The Court was assisted in its analysis by the recent decision of the Nova Scotia Court of Appeal in *R. v. MacIntosh*.[1] Although the outcome in that case turned on the judgment of the Court of Appeal that there had been a demonstrable violation of the appellant's right to be tried within a reasonable time, Beveridge J.A. went on in his opinion–concurred in by the other two judges who sat on the panel–to consider the reasonableness of the trial verdict:

> With respect, if a witness asserts that certain detailed criminal acts happened, and the trial judge finds they did not happen, and the witness was not mistaken or confused, few alternatives are left. It seems to me that the witness has deliberately lied, demonstrated a marked disregard for the truth, or is patently unreliable. On any of these interpretations, a trier of fact must be alive to the impact such a finding can have on the assessment whether the Crown has proven beyond a reasonable doubt other allegations by that witness, particularly where the allegations are similar and are without support

[1]2011 NSCA 111.

> from any other evidence. In my opinion, in this case, the trial judge did not do so. I do not mean to suggest that it would not be open to a trier of fact to convict, but failure to address these kind of issues indicates a failure to apply the proper principles in assessing the credibility of a key Crown witness. [2]

[7] While this portion of the Court's judgment is clearly *obiter,* it is nevertheless the considered opinion of the highest court in this Province on an issue that was argued fully before the Court, as the reasonableness of the trial verdict was one of the grounds of appeal from conviction. This is *obiter* that carries the force of law. It also carries the force of sound reasoning. And it is reasoning that is well applicable in this case.

[8] The Court would focus at this point on K.L.J's testimony regarding Mr. Dill's sexual activity with her in the tent Mr. Dill allegedly had brought from his house. When K.L.J. first mentioned this activity during direct examination, it clearly caught the prosecution off guard, and it was evident that this was information K.L.J. had never revealed to police or to the prosecution. Mr. Hartlen sought a recess at that point in the trial, as right-to-disclosure issues arose clearly from this new information. This was an entirely proper and thoroughly

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[2] *Id*. at para. 176.

professional approach for the Crown to have taken; rather than proceeding on a voyage of discovery, the Crown recognized immediately the significance of K.L.J.'s surprising testimony, and understood that there were trial-fairness obligations the Crown needed to fulfil before any more evidence could be heard. This is in the best traditions of the Crown, and is to be commended.

[9] Following trial recess, K.L.J. went on to describe sexual encounters with the accused in a tent the accused had brought from his home. K.L.J. stated that she had engaged in sexual activity with the accused in the tent on a "couple" of occasions, which she amplified on cross-examination as meaning up to ten times. The Court finds this testimony to be of questionable credibility.

[10] I would note that in assessing the credibility of K.L.J., I apply the principles for assessing the testimony of youthful witnesses as set out in *R. v. W. (R.)*.[3] I observe that I should not assume that the evidence of a child is always less reliable than the evidence of an adult. Furthermore, I direct myself that tests of credibility applicable to adult witnesses ought not to be applied to children. However, in this case, I had an excellent opportunity to assess the evidence of K.L.J. over the course

[3][1992] 2 S.C.R. 122.

of the two days of her testimony. K.L.J. presented herself as a very mature, self-controlled witness who demonstrated great eagerness in participating in the trial process; K.L.J. did not exhibit any hesitancy in testifying, and remained engaged throughout the course of giving her evidence. While demeanour evidence must be assessed with care by trial courts, I feel that I may conclude safely that K.L.J.'s evidence should be assessed in such a way that I need not protect it fully from the same sort of analysis that I would apply to the testimony of an adult.

[11] With respect to K.L.J. allegations about sexual encounters with the accused in the tent, I cannot accept those allegations as credible. Certainly, when a criminal act is repeated with the same victim on a large number of occasions, under similar circumstances, a court might well expect the victim's recall of those events to become scripted, so that the victim might be unable to sequester the memories of individual occurrences. But the tent encounters described by K.L.J. are different. Unlike the hundreds of sexual encounters while on Mr. Dill's all-terrain vehicle, or after K.L.J. moved in with * in *, the tent liaisons would surely have been stand-out events, because of their unusual circumstances. And yet, after a number of interviews with police, and after the completion of a full preliminary inquiry, K.L.J. did not mention the tent encounters until trial. Could this be mere

forgetfulness? I consider that possibility as being unlikely, given K.L.J.'s detail and recall of her other encounters with the accused.

[12] This credibility question then becomes amplified when I consider other questionable aspects of the case against Mr. Dill:

the fact that there is no evidence before the Court of anyone observing inappropriate physical contact between Mr. Dill and K.L.J.; while I recognize that offences of the nature alleged against Mr. Dill are rarely committed in public view, the Court would note that, with respect to the allegations of sexual contact while four-wheeling (including out near the so-called swinging bridge), K.L.J.'s evidence was that she and Mr. Dill made little effort to conceal their activity thoroughly, as K.L.J.'s parents remained close by;

the fact that there is no evidence of anyone observing any of Mr. Dill's vehicles in any of the unconcealed locations where K.L.J. stated Mr. Dill had parked to have sex with her;

the fact that there is no evidence of cellular telephone records of what must surely have been scores of cellular conversations between K.L.J. and Mr. Dill;

the fact that there is no evidence of DNA or other crime-scene-index biological deposits having been located in Mr. Dill's vehicles or on clothing worn by K.L.J., notwithstanding K.L.J.'s evidence of hundreds of encounters, that continued even after charges were laid;

the fact that there is no evidence of any witness seeing Mr. Dill in * with K.L.J.;

the fact that K.L.J. told her family–particularly, her mother, [*identifying biographical information redacted*]–that she was in * to see a Mr. M. and a Mr. W., not Mr. Dill.

[13] The Court recognizes that it falls within the discretion of the Crown to call–or not call–evidence as it sees fit; accordingly, the Court must be guarded in commenting on the failure to adduce evidence. Nevertheless, I am ever mindful that reasonable doubt may arise, indeed, from the absence of evidence.[4]

[14] In *Faryna v. Chorny*, the British Columbia Court of Appeal expressed the view that:

> [t]he credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the

[4] *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at para. 33 (S.C.C.).

> particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such cases must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions . . . .[5]

In *R. v. B.(R.W.)*, the same court stated:

> Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all the other evidence presented.[6]

[15] In *R. v. P-P. (S.H.)*, Saunders J.A.of the Nova Scotia Court of Appeal, in a separate opinion (concurring in the result with a unanimous three-member panel in quashing a conviction for sexual assault and ordering a new trial), made the following insightful comments on the assessment of demeanour:

> 28 . . . . While demeanour is a legitimate marker in the assessment of the veracity and reliability of someone

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[5][1951] B.C.J. No. 152 at para. 11.

[6](1993), 24 B.C.A.C. 1 at para. 28.

> taking the stand, it is not the only measure and must, I respectfully suggest, always be approached with caution.
>
> 29 One is not judging character. The obligation is to ascertain the truthfulness and reliability of a person's testimony. Appearances alone may be very deceptive. A most reprehensible witness may well be telling the truth. A polished, well-mannered individual may prove to be a consummate liar.
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> 30 Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness's demeanour and yet may have little bearing on that person's truthfulness. Consequently, quite apart from that witness's appearance or mood, his or her testimony must be carefully considered for its consistency or inconsistency with all of the other evidence presented at trial before any decision can be made concerning its acceptance, in whole or in part, or the weight to be attached to it.[7]

[16] While the demeanour of K.L.J. was of a very mature and composed young person, I find demeanour of little weight in assessing credibility, given the testimonial deficits which I conclude prevent the Court from accepting the evidence of K.L.J. as offering a believable account of any of the charges before the Court. I direct myself, as well, that the Court must avoid an analysis of credibility

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[7](2003), 176 C.C.C. (3d) 281 (N.S.C.A.) at paras. 28 to 30.

which turns on asking rhetorically why K.L.J. might fabricate a complaint against Mr. Dill. The problem with this sort of analysis is that it runs the risk of shifting the onus onto Mr. Dill to lead evidence of a motive to fabricate. This goes contrary to the presumption of innocence.[8]

[17] I have not ignored the evidence of J. F. and T. D. I would observe things: first, neither of these witnesses observed any inappropriate physical contact between Mr. Dill and K.L.J. Although J.F. testified that she believed at the time of her meeting with K.L.J. and Mr. Dill that the two were involved in a sexual relationship, she did not take steps to report this to the appropriate child-protection authorities. It is difficult to know what to conclude from this. As an educator, J.F. was clearly aware of her responsibility to report; yet, she did not report anything. What did she do, instead? She facilitated a counselling session with K.L.J. and Mr. Dill. Either her judgment at the time was questionable, or she overstated in Court the extent of her concerns. In any event, what J.F. and T.D. believed was going on between Mr. Dill and K.L.J. is merely a conclusion, not evidence. Further, the

[8] *See R. v. Riche* (1996), 146 Nfld. & P.E.I.R. 27 at para. 15 (N.L.C.A.); *R. v. Krak* (1990), 56 C.C.C. (3d) 555 at 561 (O.C.A.).

Court finds that it is unable to rely on J.F.'S evidence regarding the call she allegedly received from Mr. Dill trying to contact K.L.J.

[18] I find that the evidence arrayed against Mr. Dill is so substantially deficient that it is not necessary for me to consider in detail the limited alibi evidence offered by the defence, although I will say that I found it plausible and credible, linked to specific and verifiable events that were significant to the alibi witnesses–I refer, for example, to B.R.'s evidence of the time he spent with Mr. Dill on 11 November 2009, which he was able to link to the then-looming birth of his child. I also found credible the evidence of B.M. regarding her Facebook exchange with K.L.J. It was clear from Mr. Bégin's cross-examination of K.L.J. that she had indeed been confronted by B.M. on Facebook. I find as a fact that Exhibit # 5 is an accurate record of what K.L.J. and B.M. discussed through that social-networking medium. K.L.J.'s answers on cross-examination satisfy me that she was indeed referring to Mr. Dill's truck in that heated interaction with B.M. While evidence that a witness is hoping to gain materially from a criminal prosecution does not mean necessarily that the testimony of that witness should be discredited–after all, a victim of a crime may have a legitimate claim for restitution against a perpetrator–the existence of a gain-related motive does, as a matter of common

sense, attract a higher degree of scrutiny. When added to the other questionable features of the complainant's evidence, it reinforces the Court's view that the evidence against Mr. Dill does not support the a findings of guilt.

[19] Accordingly, I find Mr. Dill NOT GUILTY of the charges against him, with the exception of case number 2115405, the charge of careless storage. I will hear from counsel on that matter following a brief recess.

[20] As this decision is being given orally, and as I intend to have it transcribed, the Court reserves the right to include citations, more extensive quotations from cited cases, and to make minor editorial changes once the written decision is generated. The verdicts and the reasons, however, will not change.

Atwood J.P.C.